complaint

Mr N's complaint is about advice given by 1 FS Limited ("1 FS") with regards to a transfer of his stakeholder pension plan and pension portfolio to a new self-invested personal pension ("SIPP") wrapper in 2011. The funds in the new SIPP were promptly used to invest in an unregulated property fund (Harlequin). Mr N says the fund was unsuitable, that it resulted in a loss and that 1FS should have advised him about its unsuitability. In 2012, he used the SIPP to invest in another unregulated property fund (Forest Lakes) – he says 1FS should have advised him about the unsuitability of this fund too.

background

Mr N was introduced to the Harlequin fund by 1FS in 2011. He had been a longstanding client of the firm's adviser since the 1990s. When a third party contacted 1FS to promote the fund, it conveyed the promotion to Mr N. It says it considered the promotion suitable for Mr N because he had previous experience of buy-to-let property investments, he was a high net worth and sophisticated investor and he had asked to be notified of property investment opportunities.

1 FS says meetings were held between Mr N and the third party in relation to the promoted fund and that it was not present at those meetings. Mr N says only one meeting took place with the third party, that it took place at his home, that 1 FS was present at the meeting and that all but one correspondence with the third party and Harlequin thereafter took place through 1 FS. The plan was to fund the investment – an overseas property fund – through Mr N's pension money. He could not do so under the pension arrangements he had at the time, so the need arose to consider a SIPP that permitted such an investment.

1 FS completed a fact finding exercise on 21 March 2011. Within it, 1 FS expressly addressed the need to select a SIPP that would allow the Harlequin investment. It says Mr N initially intended to invest around £29,000 in the fund but he then increased that amount to £57,000 – 1 FS also says it discussed this increase with Mr N. Mr N disputes this, he says the only amount ever considered was £57,000. The new SIPP was selected. Between May and June 2011 funds in Mr N's stakeholder pension and pension portfolio were transferred into it. On 30 June 2011 £57,000 was paid from the SIPP into the Harlequin fund – that was as a 30% deposit, the balance was due on completion of the property's construction.

Mr N disputes some of the key contents of 1 FS' fact finding and risk assessment documents. He cannot recall signing the relevant assessment forms or going through them in detail. He accepts that his signatures appear to be genuine but says 1 FS prompted him to sign a number of blank forms – to be completed later, away from him – which he did because of the longstanding trust he had in the 1 FS adviser. He disagrees with the documents where they say he had a high attitude to risk (ATR), that he was a sophisticated investor and that he was a high net worth individual. The fact find document from 2011 does not appear to show information recorded by 1 FS about ATR rating - but the 2012 document does – however, 1 FS' financial planning report (recommendation document) in March 2011 states the "high" ATR rating.

Mr N says his profile around 2011 to 2012 was as follows:

- He was in his mid-40s, divorced and with two dependent children.
- He was self-employed, with average earnings of £35,000 to £40,000 between 2011 and 2012, £55,000 between 2010 and 2011 and £65,000 between 2009 and 2010.

- His assets included his pension arrangements, general investments, an individual savings account (ISA) and two mortgaged investment properties – all worth a total of around £430,000. Discounting the mortgages, his net worth was around £200,000. These assets defined his investment experience at the time.
- He planned to take his pension benefits between ages 60 and 65.
- He had no prior knowledge of or investment in Harlequin.

In the main, 1 FS' financial planning report/recommendation document provides as follows:

- Early in the report the adviser says – "*I practice a comprehensive approach to financial planning. I believe it is my duty to ensure all aspects of your financial affairs have been addressed, even those potential shortfalls that may not be of immediate concern*."
- The adviser refers to Mr N's existing pension arrangements and recommends a change in terms of opening a new SIPP and using that to fund the Harlequin investment. The document says the recommended pension change was assessed as having a "low" risk rating. Within the same document the adviser also appears to recommend a list of alternative funds for the SIPP.
- Assessment of Mr N's ATR as "high". Risk warnings and comparisons of options available to Mr N in terms of his pension arrangements. Provisions for reviews of Mr N's investments and provisions for 1 FS' fees.

1 FS appears to have played a pivotal role in the Harlequin investment. There is correspondence around March 2011, between it and the third party, in which the agreed arrangement appears to have been for 1 FS to submit documents and manage the application process for Mr N.

In 2012 similar circumstances appear to have been in place for Mr N's investment in the Forest Lakes fund. 1 FS was involved in the process. It assessed Mr N's ATR again. It prepared "sophisticated investor" and "high net worth individual" certification documents. A transaction entitled "*sale – general investment account*" in the SIPP account statement appears to have taken place to raise money for the fund. On 17 April 2012 Mr N invested £30,000 in Forest Lakes.

After 2012 Mr N experienced problems with both investments. By April 2016 he had complained to 1 FS. The complaint featured the Harlequin investment. His solicitor asserted that suitability of the investment had not been assessed, that advice related to the investment was unsuitable, that the SIPP was over exposed to unregulated property schemes and that benefits of the ceding scheme had not been replaced. Mr N sought compensation for the financial losses arising from his investment in Harlequin and for the costs and commissions associated with the new SIPP and with Harlequin.

1 FS did not uphold the complaint. In the main, it said:

- It assisted in the promotion of Harlequin but the third party was the drive behind promotion. The promotion was suitable for Mr N [for the reasons I stated above].
- It gave explicit risk warnings to Mr N about the Harlequin fund.
- It earned commission for its work at the outset. Despite assisting Mr N with the fund thereafter it did so at its own expense - the same applies to its efforts to assist Mr N since the Harlequin fund *effectively* went into liquidation.
- It discharged its duty of care towards Mr N and the third party was responsible for advising him to make the investment.

Mr N's complaint was referred to this service. One of our adjudicators considered it and, initially, concluded that it should not be upheld. She noted Mr N's decision not to complain about the Forest Lakes fund – suggesting that he considered it suitable. If so, and given that it was a similar fund to Harlequin, she concluded that the Harlequin fund would have also been suitable.

Mr N then clarified his reasons for not complaining about the Forest Lakes fund at the outset and explained why no negative inferences should be drawn from that decision. The adjudicator accepted his explanation. After the complaint about the Forest Lakes fund was established, she revised her view. She concluded that both complaints should be upheld as both funds were unsuitable for Mr N and that 1 FS did not discharge its duty to advise him in this respect. In the course of doing so, the adjudicator also concluded that the complaints had been made in time – as the opposite had previously been suggested. She proposed a basis for redress and that Mr N should be paid £300 for the trouble and upset caused.

1 FS did not accept this outcome so the matter was referred to an ombudsman.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I note the following:

- Mr N's complaint is about the investments in Harlequin and Forest Lakes through the new SIPP. As such, in order for the complaint to succeed I must be satisfied that 1 FS had an obligation to advise him about suitability of both funds, in addition to the work it did in helping Mr N select the new SIPP.

- The key parties in this complaint are limited to – Mr N (the investor), 1 FS (the regulated firm), the unregulated third party (the promoter of the funds) and the SIPP provider.

- The SIPP provider conducted its own appropriateness assessment for both funds, as required by the regulator at COBS 10. However, Mr N's complaint does not relate to that. 1 FS concedes that it initiated and participated in the promotions to Mr N and, thereafter, it gave him advice and, after that, it continued to assist Mr N in relation to the funds.

- Evidence of the advice and assistance given by 1 FS to Mr N at the outset suggests it was comprehensive – catering for both the SIPP selection and, at first, the Harlequin fund. As quoted above, its financial planning report declared this comprehensive approach. Yet, 1 FS argues that it was not responsible for advising on the suitability of this fund.

- I do not accept 1 FS' assertion about Mr N being advised by the third party promoter. Evidence suggests that the third party's role did not go beyond promoting and selling the funds to Mr N. I have not seen evidence that it was engaged in the activity of financial advice and I have not seen evidence of any other third party that was in a position to provide Mr N with financial advice.

- Having considered the overall circumstances of Mr N's complaint and the relevant regulatory rules I am satisfied that it would not have been fair or reasonable for 1 FS to separate the SIPP selection from the Harlequin fund that it knew Mr N would invest in – the same applies to the Forest Lakes fund.

- 1 FS had a duty to advise Mr N on the suitability (or otherwise) of both underlying funds – in addition to the SIPP selection. As I will explain below, I consider that its own evidence suggests that it was aware of this duty – or that it engaged in discharging it – but did not properly do so. As I will also explain below, I am satisfied that both funds were unsuitable for Mr N. I consider that he would have taken advice not to invest in them if he was given such advice and, as such, he would not have had cause to transfer his pension into the SIPP. Mr N's complaint about both funds and the SIPP has enough merits to be upheld.

The regulator's "client's best interests rule" (COBS 2), as it was in 2011/12 and as it remains to date, required 1 FS to act "… *honestly, fairly and professionally in accordance with the best interests of its client*". In this respect, it could not have been reasonable for it not to advise Mr N on the suitability (or otherwise) of the Harlequin fund and the Forest Lakes fund. It would not have been reasonable for it to ignore information about the underlying investments that it was aware of. Where such information led it, or ought to have led it, to know that the underlying investment was not in Mr N's best interests, it should have said so.

Evidence suggests that 1 FS did not ignore the SIPP's underlying investments. It took a meaningful degree of notice of them and it even appears to have given some elements of advice on them – for example, its risk warnings to Mr N about the Harlequin fund. Mr N disputes elements of 1 FS' fact finding at the time. However, there is no dispute over the fact that 1 FS' overall assessment exercise captured what it needed to know to properly assess suitability of the funds for him.

In this respect, I am not persuaded by 1 FS' argument about Mr N being a sophisticated and high net worth investor – I have not seen evidence of this being assessed in 2011 and, on balance, I accept that the certification documents of 2012 were probably signed by Mr N without his knowledge or understanding of what they were. 1 FS has presented this argument in order to say Mr N had previous experience of investments like Harlequin and Forest Lakes and that he had the requisite capacity for loss. I have not seen evidence of such experience – his investments in domestic buy-to-let properties was not comparable to investments in unregulated overseas property funds. I am also persuaded that Mr N's description of his financial circumstances in 2011/12 is accurate, so he was not a high net worth investor. Both funds cost him almost £90,000 and that was almost half of his net worth. Given his circumstances at the time – including the sole responsibility for his dependent children and the outstanding mortgages to cater for – I do not consider that he had the capacity to lose almost half of his net worth. In 2011/12 1 FS was in a position to foresee the risk of such a loss and to know that Mr N did not have the capacity for it.

A fair and reasonable inference to be drawn from the contents of correspondence between all three parties, and documentation leading up to both investments, is that 1 FS essentially held itself out to Mr N as being his source for advice on both the SIPP selection and the property funds. The appropriateness forms completed for the SIPP provider confirmed that Mr N was in receipt of advice from 1 FS. Evidence about fee arrangements says that 1 FS received 2% of the transfer value for the transfers into the SIPP and 5% for ongoing advice – the former related to the SIPP and the latter related to the underlying investment. I note that

1 FS says it received no ongoing fees. I have not seen enough to determine whether that was the case and, if so, why. However, the arrangement at the outset was to pay 1 FS for both the SIPP selection and for investment advice.

On balance, I conclude that 1 FS supported Mr N throughout his investments and did so in the context of advising him to proceed with the investments. It appears to have relied upon the risk warnings as a basis to satisfy itself that Mr N knew what he was getting into and that as he continued with the investments, the funds must have been suitable for him.

Even if this conclusion is wrong – which I do not consider to be the case – and if 1 FS limited its role to the SIPP selection only – which it did not – it nevertheless would have been conducting an "advisory" role in that respect. It would have been *advising* on the SIPP selection. Such *advice* amounted to a *personal recommendation,* which triggered the regulator's rule on suitability (under COBS 9). That rule, combined with the client's best interest rule, made it necessary for 1 FS to properly assess suitability of the underlying investments. Giving risk warnings was not, on its own, sufficient to discharge this duty. 1 FS was obliged to give its own recommendation as to whether Mr N should or should not invest in the funds. The views expressed by the regulator in 2013 about scenarios like this suggests that 1 FS' approach fell below the regulator's minimum expectations. I appreciate that the events in Mr B's case happened before 2013. However, the regulator's views did not create new rules. Its views reflected pre-existing rules. One of its views was:

"*… the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments …"*

I must consider whether suitable advice from 1 FS to Mr N would have prevented both investments. I am satisfied that it would. Mr N appears to have had a substantial amount of trust in his 1 FS adviser, given that they had an adviser-client relationship that went back to the 1990s. I have also observed that 1 FS was regarded, by the third party promoter and the SIPP provider, as Mr N's only representative at the time of the investments. I have not seen evidence of Mr N being influenced by any other party. I am satisfied that he was wholly under the influence and advice of the 1 FS. Taking these factors into account, if 1 FS had properly assessed both funds as unsuitable for Mr N and if it had told him that, I am convinced that he was more likely (than not) to have complied with such advice. He would not have invested in either fund and would not have had cause to open the SIPP. For the sake of completeness, I am aware that some investors had financial incentives to invest in the Harlequin fund. I have seen no evidence of such incentives in Mr N's case.

fair compensation

I am aware that a party involved with the scheme has been charged with fraud offences. A court might therefore conclude that Mr N's loss has not flowed directly from unsuitable advice (or lack of advice) from 1 FS. However, in assessing fair compensation, I'm not limited to the position a court might take. It may be there has been a break in the "*chain of causation*". That might mean it would not be fair to say that all of the losses suffered flowed from unsuitable advice. That will depend on the particular circumstances of the case. No liability will arise for an adviser who has given suitable advice; even if fraud later takes place, but the position is different where the consumer would not have been in the investment in the first place without the unsuitable advice (or the absence of advice that should have been

given). In that situation, it may be fair to assess compensation on our usual basis. I consider this to be the case for Mr N.

It would be fair and reasonable to make an award, given the specific circumstances of this case. This is notwithstanding any arguments about a break in the "*chain of causation*". I am satisfied that Mr N would not have invested in the Harlequin or Forest Lakes funds (or moved his pensions) but for the unsuitable advice from 1 FS and I consider that 1 FS disregarded his best interests in this respect. As such, it is fair and reasonable to hold 1 FS responsible for the whole of the loss suffered by Mr N. I am not asking 1 FS to account for loss that goes *beyond* the consequences of its failings. I am satisfied those failings have caused the full extent of the loss from the funds. That other parties might also be responsible for that same loss is a distinct matter, which I am not able to determine. However, that fact should not impact on Mr N's right to compensation for the full amount of his loss.

My aim is to put Mr N as close as possible to the position he would now be in if he had been given suitable advice. On balance, I consider that Mr N would not have made any changes to his pension arrangements if he was advised not to invest in the Harlequin fund and that his subsequent investment in the Forest Lakes fund would never had happened. Investment in such funds was not within his consideration at the time – the idea arose because 1 FS essentially promoted it to him, alongside the third party promoter. I appreciate that it is unlikely to be possible for 1 FS to reinstate Mr N into his previous pension arrangements. There are a number of possibilities and unknown factors in making an award in such circumstances. The potential variables are unknown and each may have an impact on the extent of any award this service may make.

While it could be complicated to put Mr N back in the position he would have been in if suitable advice had been given, I consider that he should be compensated now. It does not seem fair or reasonable to wait and determine each and every possibility before making an award. What is set out below is a fair way of achieving this.

what should 1 FS do?

1. Obtain the notional transfer value of Mr N's previous pension arrangements, on the date of this decision, if there had not been a transfer to the SIPP.

   1 FS should ask Mr N's former pension provider(s) to calculate the notional transfer value that would have applied as at the date of this decision had he not transferred his pension but instead remained invested in the same funds. 1 FS should assume that any contributions or withdrawals that have been made would still have been made, and on the same dates.

   If there are any difficulties in obtaining the notional valuation then the FTSE UK Private Investors Income Total Return Index should be used. That is a reasonable proxy for the type of return that could have been achieved if suitable advice had been given.

2. Obtain the transfer value, as of the date of calculation, of Mr N's SIPP, including any outstanding charges.

   This should be confirmed by the SIPP provider. 1 FS should then deduct the result of (2) from the result of (1). If there is a positive difference that will be the loss to Mr N's pension.

3. Pay the commercial values to buy Mr N's share in the Harlequin property fund and to buy his share in the Forest Lakes property fund.

   The SIPP only exists because of Mr N's investment in both funds. It would be fair to remove them from the SIPP, as Mr N would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. Valuation of both funds may be difficult if there is no market for them. If so, 1 FS should agree an amount with the SIPP provider as a commercial value. It should then pay the sum agreed plus any costs and take ownership of Mr N's shares of the investments. If 1 FS is unable to take ownership in this manner it should give the funds a nil value for the purposes of calculating compensation.

   Mr N, through the SIPP, paid a deposit under contract to the Harlequin fund. I seek to redress that loss for him. Mr N agreed to pay the remainder of the purchase price under a separate contract however that payment has not yet been made, so at present he has suffered no further loss in that respect. However, if the property is to be completed the scheme could require that payment to be made, so there is a potential for further loss to Mr N. Mr N must understand this and must understand that he would not be able to bring a further complaint to us with regards to any such further loss. Mr N may want to seek independent legal advice in this respect and with regards to any continuing liability under the separate payment related contract. It is not clear that the same arrangement exists for the Forest Lakes fund. If so, this paragraph applies to that fund in equal measure.

4. Pay an amount into Mr N's SIPP so that the transfer value is increased to equal the value calculated in (1). This payment should take account of any available tax relief and the effect of charges.

   The compensation should be able to be paid gross into a pension plan where it will remain until Mr N retires. He should also be able to contribute to pension arrangements and obtain tax relief as usual upon them.

   If it is not possible to pay the compensation into the SIPP, 1 FS should pay it as a cash sum to Mr N. Had it been possible to pay it into a pension plan it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid – to be calculated using Mr N's marginal rate of tax in retirement.

5. Pay any future fees owed to the SIPP until it is closed.

   Had 1 FS given suitable advice and based on the likelihood that Mr N would have followed such advice, there would be no SIPP. It is therefore unfair for Mr N to continue to pay the annual SIPP fees until it is closed or if it cannot be closed. 1 FS should be able to take over the investment to allow the SIPP to be closed, however I do not know how long that will take. To provide certainty to all parties 1 FS should pay Mr N an upfront lump sum equivalent to five years' worth of SIPP fees (calculated by using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

   In return, 1 FS may ask Mr N to provide an undertaking to account to it for the net amount of any payment he may receive from the investments in that five year period,

as well as any other payment he may receive from any party as a result of the investments. That undertaking should allow for the effect of any tax and charges on the amount he may receive from the investment. If, at the end of this period, 1 FS wants to keep the SIPP open, and to maintain an undertaking for any future payments under the investment, it must agree to pay any further future SIPP fees. If it fails to do so, Mr N always has the option of applying to close the SIPP himself.

6. Pay Mr N £300 for the trouble and upset caused to him by this matter.

my final decision

For the reasons given above, I uphold Mr N's complaint.

I order 1 FS Limited to compensate Mr N as I have detailed above and to pay him £300 for the trouble and upset the matter has caused him. 1 FS Limited should also give Mr N a calculation of the compensation in a clear and simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 27 November 2017.

Roy Kuku
ombudsman